

KEY INSIGHTS FROM GST LEGAL RULINGS



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GST Demand Order cannot be passed without issuing Show Cause Notice

Case Name: M/s Yash Building Material vs. State of U.P. and 2 Others (Allahabad High Court)

Appeal No.: Writ Tax No. 1435 of 2022

Introduction:

The Allahabad High Court delivered a pivotal judgment in the case of Yash Building Material v. State of Uttar Pradesh [Writ Tax No. 1435 of 2022, dated January 31, 2024], wherein it invalidated demand orders issued without the requisite Show Cause Notice (SCN). The Court's ruling emphasizes the critical importance of due process in matters related to taxation.

Background:

- M/s YASH BUILDING MATERIAL ('the Petitioner') received a Notice dated June 4, 2021, under Section 74(5) of the Central Goods and Services Tax Act, 2017 ('the CGST Act'), asserting tax liability.
- According to Section 74(7) of the CGST Act, if the tax remains unpaid, the proper officer must issue a notice under Section 74(1) of the CGST Act read with Uttar Pradesh Goods and Services Tax Act, 2017 ('the UPGST Act').
- The Assistant Commissioner ('the Respondent') failed to serve the Show Cause Notice (SCN) to the Petitioner. Subsequently, the Respondent passed an Order dated July 30, 2021 ('the Impugned Order').
- The Petitioner appealed against the Impugned Order, arguing the absence of a notice under Section 74(1) of the UPGST Act. However, the Additional Commissioner ('the Respondent') issued an Order dated August 31, 2022 ('the Impugned Order').
- Thus, aggrieved by the Impugned order, the Petitioner has filed the present writ petition.

Issue:

- Whether the demand orders can be passed without issuance of the SCN?

Court Proceedings:

- The matter came before the Hon'ble Shekhar B. Saraf, J.
- The Petitioner was represented by Sri Pranjal Shukla, while the State was represented by Sri Ravi Shanker Pandey, the learned Additional Chief Standing Counsel.

Observations and Conclusion:

- **Notice Issue:** The Petitioner contended that the orders in question lacked a legal basis due to the absence of a proper Show Cause Notice under Section 74(1) of the CGST Act read with UPGST Act. The Petitioner highlighted that although a notice was issued under Section 74(5) of the Act on June 4, 2021, asserting tax liability, the subsequent procedure as mandated by law was not followed.
- **Procedural Irregularity:** The Court observed that according to Section 74(7) of the CGST Act read with UPGST Act, upon the non-payment of tax after issuance of a notice under Section 74(5), the proper officer is mandated to issue a show cause notice under Section 74(1). However, in this case, such a notice was not issued. Instead, the impugned orders were passed directly.
- **Legal Conclusion:** Based on the above analysis, the Court concluded that the impugned orders lacked a legal foundation due to the failure to adhere to the prescribed procedural requirements. As a result, the Court deemed it necessary to quash and set aside the orders dated July 30, 2021, and August 31, 2022.
- **Future Action:** The Court directed that the Respondents were at liberty to proceed in the matter but only after issuing a notice under Section 74(1) of the Act, thus emphasizing the importance of procedural compliance. Thus, the writ petition filed by M/s Yash Building Material was allowed by the Court.

Comments:

This case underlines the importance of procedural compliance in tax matters, particularly in the issuance of notices and adherence to statutory provisions. It highlights the judiciary's role in ensuring that administrative actions are conducted in accordance with the law, thereby upholding the principles of natural justice. Additionally, it serves as a reminder to tax authorities to strictly adhere to procedural requirements to avoid legal challenges and setbacks in their enforcement actions.

Relevant Legal Provisions:

Section 74 of the CGST Act: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

- (5) *The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*
- (6) *The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*
- (7) *Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*
- (8) *Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.*
- (9) *The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*
- (10) *The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*
- (11) *Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*

Explanation 1.-For the purposes of section 73 and this section,-

- (i) *the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;*
- (ii) *where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122 and 125 are deemed to be concluded.*

Explanation 2.- For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.

Taxability of Personal guarantee by Managing Director under GST

Case Name: M/s BST Steels Pvt Ltd vs. The Superintendent of Central Tax (High Court, Telangana)

Appeal No. Writ Petition No. 21384 of 2023

Introduction:

The Telangana High Court affirms the order issued by the Additional Commissioner regarding the liability to pay Goods and Services Tax (GST) on guarantees or securities provided by a Managing Director (MD) to a bank for the Company.

Background:

- M/s YBST Steels Pvt Ltd ('the Petitioner') filed a writ petition against the order dated 31/03/2023 by the Additional Commissioner ('the Respondent'), affirming the order dated 18/11/2021 passed by the Superintendent of Central Tax ('the Respondent') regarding the taxability on guarantees or securities provided by a MD to a Bank for the Company.

Issue:

- The core issue concerned whether GST is applicable to guarantees or securities provided by the MD, using personal properties as security and personal guarantee, to a Bank for the Company.

Court Proceedings:

- The matter came before the Hon'ble P. Sam Koshy.
- The Petitioner was represented by Sri Basavaraj Bala Krishna
- The Respondent was represented by Sri Dominic Fernandes

Observations and Conclusions:

- Contention of the Petitioner: The Petitioner argued that the guarantees or securities provided by the MD should be exempt from GST liability.
- Contention of the Respondent: The Respondent presented Notification No. 13/2017-Central Tax (Rate) dated 28.06.2017, issued by the Government of India, Ministry of Finance, which specifies categories of services subject to tax on a reverse charge basis. The Respondent referred to Clause 6 of the said notification which pertained to services supplied by a director of a Company or body corporate to the Company or body corporate itself.
- Interpretation of the said Notification: The Court analyzed the said notification and found that services provided by a director to the Company or body corporate fall under the reverse charge mechanism, making the Company liable to pay GST for such services.
- Court's Decision: Considering the notification and the arguments presented, the Court concluded that the orders of the Authorities were not erroneous or arbitrary. It upheld the imposition of GST on the guarantees or securities provided by the MD and rejected the Petitioner's contentions. The writ petition challenging the imposition of GST on guarantees or securities provided by the MD was dismissed by the Court.

Comments:

- It may be noted that Central Board of Indirect Taxes and Customs ('CBIC') has issued a Circular (No. 204/16/2023-GST dated October 27, 2023) clarifying on issues pertaining to taxability of personal guarantees and corporate guarantees in GST.

Activity of personal guarantee by Director:

- The Circular clarifies that the director and the company are related persons as per explanation to Section 15(a) of the Central Goods and Services Tax Act, 2017 ('CGST Act').

- Further, the activity of providing personal guarantee by the Director to the banks/ financial institutions for securing credit facilities for their companies is to be treated as a supply of service, even when made without consideration as per Section 7(1)(c) of the CGST Act read with S. No.2 of Schedule I of the CGST Act.
- In case the personal guarantee is provided without any consideration, the value of taxable supply would be determined under Rule 28 of the CGST Rules i.e. as per the open market value of such supply.
- The Reserve Bank of India vide its Circular No. RBI/2021-22/121 dated 9th November, 2021 prohibits payment to the director by the Company for such guarantees.
- Accordingly, the Circular clarifies that the open market value of the said transaction/ supply may be treated as zero and therefore, taxable value of such supply may be treated as zero. In such a scenario, no tax is payable on such supply of service by the director to the company.
- Further, in cases where the director, who had provided the guarantee, is no longer connected with the management but continuance of his guarantee is considered essential because the new management's guarantee is either not available or is found inadequate, or there may be other exceptional cases where the promoters, existing directors, other managerial personnel, and shareholders of borrowing concerns are paid remuneration/ consideration in any manner, directly or indirectly. In all these cases, the taxable value of such supply of service shall be the remuneration/ consideration provided to such a person/ guarantor by the company, directly or indirectly.

Relevant Legal Provisions:

Notification No.13/2017 - Central Tax Rate F.No.334/1/2017-TRU Dated 28th June, 2017

<i>Sl. No.</i>	<i>Category of Supply of Services</i>	<i>Supplier of service</i>	<i>Recipient of service</i>
6	<i>Services supplied by a director of a company or a body corporate to the said company or the body corporate.</i>	<i>A director of a company or a body corporate</i>	<i>The company or a body corporate located in the taxable territory.</i>

